IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. E. HUSTON and CLARA S. HUSTON,
Plaintiffs in Error,

vs.

THE BIG BEND LAND COMPANY,
E. T. HAY and J. C. McCAUSTLAND,
Defendants in Error.

No. 4108

Upon Writ of Error to the United States District Court of the Eastern District of Washington

Brief for Defendants in Error

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EMPIRE PRINTING CO., SPOKANE

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Note. To avoid confusion, we shall refer to the plaintiffs in error as Huston, to the defendant in error Big Bend Land Company as the Land Company, and to the individual defendants in error, who were sureties on the bond in suit, as the Sureties.

I. Simplification of Issues.

Much of Huston's brief is taken up with a discussion of matters which are wholly irrelevant to this case, and we shall put them out of the way before discussing what is relevant.

(1) The Land Company brought an unlawful detainer action against Huston in a state court of Washington, and to obtain possession of the land involved prior to judgment, gave bond as required by the Washington statute. Huston sues upon that bond. In the unlawful detainer action, the Supreme Court of Washington held that the lower court, which had entertained the action and given judgment in favor of the Land Company, was without jurisdiction of the action, and had no power to do anything but dismiss it. *Big Bend Land Company v. Huston,* 98 Wash., 640, 168 Pac., 470. Upon remand of the cause, Huston moved the lower court to dismiss the action not only, but also to restore to him possession of the land involved, from which he had been ousted by a writ of restitution. The lower court refused to make any order but one dismissing the action, and upon mandamus brought by Huston, the Supreme Court sustained the lower court in that position. This upon the ground that

the lower court had never acquired jurisdiction over the action; that the situation was the same as though no attempt had been made to begin an action, and the Land Company had taken possession of the land by force; and that the courts possessed no power over the action, or what had been done therein, save to clear their records of what purported to be, but was not, an action. To quote:

> "The situation of the relators, in so far as present rights of action and remedies are concerned, is the same as if the Big Bend Land Company had, without beginning suit at all, gone upon the land in controversy and forcibly removed the relators therefrom. The relators have been denied no remedy. They may bring an action for any relief to which they may conceive themselves entitled."
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> *State ex rel. Huston v. Big Bend Land Co.,* 100 Wash., 425, 171 Pac., 259.

Now, Huston argues at considerable length that the foregoing decision was erroneous. This Court will not, of course, consider that question. The Supreme Court of Washington had the power to decide what was the nature and effect of the proceeding before it. If in so deciding it violated any right secured to Huston by the laws of the United States, he could have had remedy in the Supreme Court of the United States. But now, in this and every other court, it is settled that the bond sued on was given in, and as a part of, a cause over which the court in which it purported to be brought

had no jurisdiction, and, consequently, that in the eye of the law no such cause ever existed. It is for this Court to decide how that situation affects Huston's right of action on the bond. In deciding that question, however, it cannot inquire into the propriety of the decisions of the state courts in the previous litigation. The matters there decided have passed into the realm of things adjudicated, and are beyond the reviewing power of any court.

(2) It is urged that if Huston has no right of action on the bond in suit, he is without remedy for the injury he alleges has been done him. If that were true, it would go far toward establishing his right of action, for certainly the law does not intend that any man shall be without remedy for legal wrong done him. But it is not true. Huston had at least two other remedies if any legal wrong was done him by his eviction. In the first place, he had a remedy against the Land Company, irrespective of the bond. If the allegations of his complaint are true, the Land Company wrongfully obtained possession of his property by the use of void process, the execution of which it procured by the action of a court without jurisdiction. The Land Company was therefore a trespasser *ab initio,* and was liable to Huston for any damage done him by the trespass. Cf. in analogous case of attachment, 6 Corpus Juris, pp. 493-94, §§1162-64. In the second place, the sheriff who executed the writ of restitution and his bondsmen were liable. An officer

is not protected by process issued by a court without jurisdiction. *Wise v. Withers,* 3 Cranch, 331 *Dynes v. Hoover,* 20 How., 65, 35 Cyc., 1740. It is true that where process is issued by a court of general jurisdiction, and the process shows apparent jurisdiction in the particular case, the officer executing it is protected. But here the sheriff served the summons and all other process in the case. *Big Bend Land Co. v. Huston,* 98 Wash., 640, 641-42. Knowing the law, as he must be presumed to, he knew that the necessary steps had not been taken to invest the court with jurisdiction. Furthermore, if process is issued by a court of general jurisdiction, but in a matter which is not appurtenant to its general jurisdiction, as where its authority to act is special and statutory, the officer cannot justify under the process alone, but must show that the statutory requirements for the exercise of jurisdiction have been complied with. 35 Cyc., 1742. The superior courts of Washington are courts of general jurisdiction, but such courts, when acting in forcible entry and unlawful detainer proceedings, "exercise a special, statutory, and extraordinary power and stand upon the same footing and are governed by the same rules as courts of limited and inferior jurisdiction." Accordingly, there is no presumption in favor of the record, and the facts which give jurisdiction must affirmatively appear on the face of the record, otherwise the proceedings are not voidable merely, "but absolutely void, as being *coram non judice.*" 26 Corpus Juris, p. 843, §92. See also the

language used in the first Huston Case (98 Wash., 643), and in *State ex rel. Seaborn Co. v. Superior Court,* 102 Wash., 215 (172 Pac., 826), where it was said that in unlawful detainer or forcible entry and detainer cases, the court "having jurisdiction only by virtue of a strict compliance with a special statute, was, to all intents and purposes, sitting as a special tribunal, * * and was not sitting as a court with general legal or equitable jurisdiction."

Huston, then, had ample remedy for any legal wrong done him. He had a right of action against the Land Company alone, against the sheriff and his bondsmen, or against the Land Company and the sheriff. Denial of his right of action upon the bond in suit does not mean the denial of any remedy to him, but merely means that he has passed over the ample remedies that he certainly had to pursue a remedy that he is not entitled to. The situation is summed up in the closely analogous case of *Caffrey v. Dudgeon,* 38 Ind., 512, 521, where it was said:

> "The conclusion that we have reached does not deprive the appellant of a remedy, for the justice of the peace who issued the writ, the plaintiff in that action who procured him to issue it, and the officer who served it, if the want of jurisdiction appeared on the face of the writ, were trespassers, and as such are liable for the consequences of their wrongful and illegal acts."

II. No Right of Action on the Bond.

Counsel are guilty of two fundamental errors in presenting Huston's claim that he has a right of action on the bond. They assume that the sole question is whether there was a consideration for the bond, and they fail to distinguish between the legal principles which give Huston a right of action against the Land Company independent of the bond, and those which govern when recovery is sought from the Sureties by an action on the bond. Those errors render their argument and authorities inapplicable.

There are several viewpoints from which the case may be considered, from any of which Judge Rudkin's decision is seen to be right. Our principal position, however, is this: No recovery can be had on the bond as a statutory bond because of failure of jurisdiction in the unlawful detainer action. There can be no recovery on it as a voluntary bond, because that would be to impose upon the Sureties different obligations from those which they assumed when they executed the statutory bond.

Before turning to the authorities, let us briefly review the facts upon which the position above stated depends.

The bond was given under §819, Remington's Comp. Statutes 1922, which reads as follows:

> "The plaintiff, at the time of commencing an action of forcible entry or forcible detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which

> the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such a sum as the court or judge may order, with two or more sureties, to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out."

By reference to the complaint (record, 2), and the opinion in the first Huston Case (98 Wash., 640), it will be seen that the complaint was filed, the bond in suit was executed and delivered, and the writ of restitution was issued, on the same day: March 4, 1915. The wrong complained of, Huston's eviction under the writ of restitution, was done six days later, on March 10th. It was not wrongful because of anything done before or at the time of the delivery of the bond and the issuance of the writ of restitution, but because of the subsequent failure to perfect the court's jurisdiction. Because of this, as we read in the 98 Washington, "there was never a time when the court had jurisdiction of both the person and the subject matter simultaneously," and the plaintiff's (Land Company's) position was lik-

ened to that of one who "had forcibly ejected defendants from the premises." This similitude was emphasized in the 100 Washington, where, holding that the court could not, in the instant action, restore Huston to the possession he had given up under the void writ, it was said that the situation was the same as if the Land Company "had, without beginning suit at all, gone upon the land in controversy and forcibly removed (Huston) therefrom." In other words, the Land Company was a naked trespasser when it evicted Huston and took possession of the premises in dispute.

Now, two things are obvious. The first is that the Sureties intended to be responsible only for proceedings *coram judice.* The bond was given in a pending action, and it cannot be claimed that they intended to respond for their principal's acts quite beyond the scope of that action, *e. g.,* for his abandonment of the action and forcible seizure of the property in dispute without color of right or justification under the action. A surety might well be willing to stand good for another's acts done under lawful process, yet refuse to respond for what the same person might see fit to do under void process, acting beyond the jurisdiction of the courts. The second is that to hold the Sureties for the wrong complained of is to enlarge the conditions of the bond. The bond is conditioned as required by statute; that the principal should prosecute the action without delay, pay all costs adjudged to the de-

fendants, and all damages sustained by the wrongful suing out of the writ. Huston alleges no breach of any of those conditions. The writ was rightfully issued, in strict compliance with the statute. The breach alleged is that the writ was wrongfully executed, in that the court was without jurisdiction of the cause when it was executed. To hold the Sureties liable for their principal's acts after the court had lost jurisdiction of the cause is to enlarge the liability they intended and agreed to assume.

The authorities sustain the positions above taken. In *Conant v. Newton,* 126 Mass., 105, one Sanderson was appointed trustee of an estate by a probate court, and gave bond in an amount fixed by the court. The probate court had no jurisdiction over the matter. Sanderson continued as trustee for some ten years, when he resigned. He had converted to his own use or wasted the greater part of the estate, and suit was brought on his bond. It was held that as all the proceedings were *coram non judice,* the suit could not be maintained as one on a probate bond. Then the plaintiff insisted that it was valid as a common law bond. It was held otherwise. The bond, it was said, was given with the understanding and belief that the probate court had jurisdiction, and that the estate would be administered by that court according to law. Since the court did not have the power to supervise and control the trustee, compel accountings, etc., "it was legally impossible to perform the conditions of the bond according to its

true spirit and meaning." The conclusion of the Court was summed up in these words:

> "In order to hold the defendants liable as on a bond at common law, we must treat this bond as if its condition was solely that Sanderson should faithfully manage and pay over the estate in his hands to the person entitled to it. But this was not the obligation which the defendants intended or consented to assume. They intended to become liable as sureties for one who was under the jurisdiction of the Probate Court, and who in administering the estate must conform to the rules and practice of that court. To hold them bound as upon a voluntary contract to be responsible for a trustee not subject to the jurisdiction of the Probate Court would be to change the character of their contract and to increase their liability."

That language is applicable here. To become surety for one who proceeds according to law, using lawful process and acting within the court's jurisdiction, is one thing. To become surety for one who abandons an action he has begun, resorts to the use of void process, and acts without the jurisdiction of the court, is quite another thing. In illustration: The superior court, having sustained the proceedings in the unlawful detainer action as within its jurisdiction, tried the action on its merits, and rendered judgment for the plaintiff (Land Company). Presumably, therefore, it was entitled to possession of the land. But its manner of securing possession of the land was, as the Supreme Court held, equivalent to taking forcible possession of the land with-

out beginning suit at all. The Sureties intended and consented to assume liability only for what was done in the action which was begun when they executed and delivered the bond, and not for what their principal might do independently, in excess of the court's jurisdiction, and without authority from it. They intended, in other words, to become liable for what was done *coram judice,* but not for what was done *coram non judice.* They cannot be held upon a statutory bond, and to hold them as upon a voluntary bond would, in the language of the Massachusetts court, "be to change the character of their contract and to increase their liability."

Of related facts and to the same effect as the Conant Case are *Thomas v. Burrus,* 23 Miss., 550, *Crum v. Wilson,* 61 Miss., 233, and *Justices v. Selman,* 6 Ga., 432. Of unrelated facts but to the same effect is *Kuhl v. Chamberlin* (Ia.), 118 N. W., 776. In the latter case a banker gave a bond to a county treasurer which recited that the banker had been appointed a depositary of county funds, and undertaking that he would account as such for the funds deposited with him. He was never appointed a depositary of county funds, but the treasurer nevertheless deposited such funds with him. A loss was sustained, and it was attempted to hold the sureties as on a common law bond, it being conceded that there could be no recovery as on a statutory bond because the banker had never been appointed a depositary. It was held that there could be no re-

covery, because the liability of the sureties on a common law bond would be different from their liability upon the statutory bond which they intended to execute.

Another viewpoint is presented by a line of cases typified by *Caffrey v. Dudgeon,* 38 Ind., 513. That case is, in all its features, singularly like the case at bar. Dudgeon began a replevin action before a justice of the peace, gave bond, and by means of a writ of replevin obtained possession of the property in dispute. The justice was without jurisdiction of the action, and on motion of the defendant the action was dismissed, the justice ordering a return of the property. Dudgeon refused to return it, whereupon an action on the bond was instituted. The defendants, Dudgeon and his sureties, demurred to the complaint, the objection urged being that it appeared that the justice "had no jurisdiction of the action of replevin, and that consequently the bond was illegal and void." The demurrer was sustained, and on appeal the ruling was upheld. The opinion is too long to permit of quotation. Suffice it that the conclusion of the Court was that "as the authority to approve a bond and issue a writ in replevin is conferred solely and exclusively by statute, it necessarily and unavoidably results that if the justice of the peace had no jurisdiction of the cause, the bond must be void," sustaining the conclusion by the citation of a number of cases. It was also said that: "The bond must be valid under

our statute, or it will be void. Justices having no civil jurisdiction at common law, it cannot be sustained as a common law obligation."

As may be gathered from the above excerpts, emphasis was placed in the above cited opinion upon the fact that the justice exercised a limited jurisdiction, unknown to the common law, and wholly dependent upon statute. Precisely the same condition exists here. An unlawful detainer action is "in derogation of the common law," the "statute conferring jurisdiction must be strictly pursued," and if it is not "jurisdiction will fail to attach and the proceeding will be a nullity" (98 Wash., 643). The court "having jurisdiction only by virtue of a strict compliance with a special statute," sits "as a special tribunal," and not "as a court with general legal or equitable jurisdiction" (102 Wash., 217). The similitude in all respects of the Caffrey Case to the case at bar makes it a compelling authority.

Other replevin cases to the same effect are *Robinson v. Bonjour* (Col.), 66 Pac., 451, and *McBrayer v. Jordan* (Neb.), 103 N. W., 50. An attachment case proceeding on the same principle is *Benedict v. Ray,* 2 Cal., 251.

Finally, there was no consideration for the bond. It was given to procure the exercise of the court's jurisdiction to put the Land Company in lawful possession of the land in dispute. It failed of its

purpose. The jurisdiction of the court was not evoked, and lawful process, which would protect the user of it, was not obtained. The lower court, the only court that considered the merits of the unlawful detainer action, held that the Land Company was entitled to possession of the land in dispute. Its failure to get lawful possession of it was due to the failure of the court's jurisdiction. The bond, therefore, did not accomplish the purpose for which it was given, and consequently its consideration failed.

The case of *Davis v. Huth,* 43 Wash., 383, 86 Pac., 654, is squarely in point. Judgment was recovered against several defendants. Some of them attempted to appeal, and gave an appeal and supersedeas bond to perfect the appeal and stay execution of the judgment. They failed to serve their codefendants with notice of appeal, and the Supreme Court dismissed the appeal for want of jurisdiction. It was held there could be no recovery on the bond; that it was given solely to effect an appeal, and as it had failed in that purpose, it was without consideration. To quote (43 Wash., 386):

> "The jurisdiction of this court on appeal was the whole consideration for the bond sued on in this case. There was no other consideration, and since that jurisdiction failed by reason of no notice or an insufficient notice, as we held it was in *Davis v. Tacoma & Power Co.*, 35 Wash., 203, 77 Pac., 209, the consideration for the bond failed and no recovery can be had upon it."

And so here. The sole consideration for the bond in suit was the exercise of the court's jurisdiction to put the Land Company in possession of the land. As that jurisdiction was not exercised, the consideration of the bond failed.

We pause to remark upon distinctions which have been and may be attempted of the above case.

(a) It is said in Huston's brief that in the Davis Case the sole consideration for the bond was the evocation of the jurisdiction of the Supreme Court, while here the jurisdiction of the court did not depend on the bond. That is mere quibbling. The bond in the Davis Case was one of the instruments by which it was sought to secure the exercise of the jurisdiction of the Supreme Court to hear the appeal. The bond here was one of the instruments by which it was sought to secure the exercise of the jurisdiction of the Superior Court to put the Land Company in possession of the land. In both cases the bonds failed to effect their purpose because of the failure of the principals to take steps necessary to an exercise of the desired jurisdiction. If the consideration failed in the one case, it certainly did in the other.

(b) It seems to be thought that the Sureties cannot plead that the consideration for the bond failed, inasmuch as the failure to procure an exercise of the court's jurisdiction was due to the omissions of their principal, the Land Company. The

same condition was present in the Davis Case. The failure of consideration there was due to the omission of the sureties' principals, the appellants, to serve notice of appeal on their co-defendants.

(c) It may be argued that by giving the bond the Land Company got possession of the land, and that this constituted a consideration. The fault is in the premise. It was the sheriff's wrongful act, not the giving of the bond, that enabled the Land Company to get possession of the land. The filing of the complaint, the giving of the bond, and the issuance of the writ of restitution, were all lawful acts, and of them no complaint can be made. The sheriff, however, executed the writ without serving a summons upon Huston, and in doing so acted without process, because the court had no jurisdiction. In no legal sense can the giving of the bond be said to have been cause for that wrongful act. If we indulge in speculation, we may surmise that a writ of restitution would not have issued if a bond had not been given, and that the sheriff would not have put the Land Company in possession if no writ of restitution had been issued. But legally there is an impassable gulf between the lawful things which were done within the court's jurisdiction, and the unlawful things which were done without it. The giving of a bond to procure the issuance of a valid writ, with intent that it should be lawfully executed, is not the legal cause for its un-

lawful execution, when the court has lost or never acquired jurisdiction.

Furthermore, however the matter might stand between Huston on the one hand, and the sheriff and the Land Company on the other, as against the Sureties the bond cannot be said to be the cause for the sheriff's wrongful act in putting the Land Company in possession. The situation may be likened to that where there is abuse of process. If a valid writ is placed in an officer's hands, without direction as to the manner of its execution, he alone is liable for its misuse. It is only when the plaintiff advises or assists in abuse of the process, or subsequently ratifies the officer's acts, that he also may be held. 1 R. C. L., p. 111, §16, 32 Cyc., p. 543, subd. E. There is no suggestion that the Sureties assisted in, advised, or even knew of the unlawful use of the writ. They executed a bond for the purpose of procuring a lawful writ, intending that it should be lawfully used to put the Land Company in possession. That the writ was afterwards perverted, and used for an unlawful purpose wthout their consent or knowledge, certainly does not, as against them, clothe the bond with a consideration. To put in shortly, they executed a bond to invoke an exercise of the court's jurisdiction. The consideration of the bond failed because the jurisdiction was not exercised. It cannot, as against them, be invested with a different

consideration because of the unlawful use made of the writ without their knowledge.

It should be remarked that much the same argument for a consideration was made in the Davis Case, and was thus disposed of:

> "Counsel for appellant say, however, that the bond served the purpose of a supersedeas until the cause was dismissed by this court, and that therefore there was a consideration. The fact that the appellants in this action did not take out an execution on their judgment while the supersedeas bond was on file does not give them a cause of action on the bond. The bond was a supersedeas on account of the appeal, and for no other reason or purpose. The bond became ineffective. Each depended upon the other. When no notice was given, the bond never became effective and did not supersede the judgment. Execution might have been taken out at any time. There was no consideration for the bond, and the lower court properly sustained a demurrer upon this ground."

The writ in the present case was like the notice of appeal in the cited case. Both were ineffective because the courts did not obtain jurisdiction. If the bond fell with the process in the one case, it must likewise have fallen in the other.

Another apposite case is *Couchman v. Lisle* (Ky.), 33 S. W., 940. Contestants of a will appealed, and moved for the appointment of a curator to take charge of the property involved pending the appeal. The court appointed a curator, but required the appellants to give a bond as a condition to

such appointment. It was conceded that the bond was not a statutory bond, but it was insisted that it was a valid common law obligation, upon a sufficient consideration, because thereby the appellants had procured the appointment of a curator. It was held otherwise, the court saying: "But it seems to us that the court had no authority to appoint a curator. Hence, the bond was executed without authority of law, and is therefore not obligatory."

In *Powers v. Chabot* (Cal.), 28 Pac., 1070, the syllabus is as follows:

> "The statutory undertaking given on appeal will operate as a stay of execution; and, where another undertaking is given for the purpose of staying the execution, it is without consideration, and cannot be enforced, either as a statutory or common law obligation, against the sureties thereon, though the judgment was for the foreclosure of a chattel mortgage on perishable property, and the obligee, relying on such undertaking, refrained from disposing of such property pending the appeal, and was thereby damaged, as the statutory undertaking did not contemplate a stay of sale of the property."

See also the syllabi in *Roystone Co. v. Darling* (Cal.), 154 Pac., 15, one paragraph of which is as follows:

> "A bond given solely to comply with a statute which is itself void, or which does not require the bond as supposed, is without binding force."

Other cases denying recovery upon bonds given to procure the exercise of jurisdiction, where they fail to effect their purpose because of want of jurisdiction, are *Steele v. Crider,* 61 Fed., 484, *U. S. v. Morris,* 153 Fed., 240, and *Pike v. Neal,* 73 Maine, 513.

We turn now to another class of cases, of which *Pacific National Bank v. Mixter,* 124 U. S., 721, is typical. In actions against a national bank, attachments were levied on its property. There was no statute authorizing the levy of attachments on the property of a national bank, and the attachments, consequently, were invalid. Without raising that question, however, the bank gave bonds, in accordance with the state practice, for the dissolution of the attachments. The bank's receiver subsequently brought suit to cancel the bonds, and for a return of securities pledged to indemnify the sureties thereon, and was granted the relief prayed. The bond involved was not a statutory bond, the Supreme Court said, because there was no law authorizing the levy of an attachment on the property of a national bank, and consequently "there could be none for taking the bond" to dissolve the attachment. Of its enforceability as a common law bond, the Court said (p. 729):

> "Neither is the bond binding as a common law bond. If the attachment had been valid, and the bond taken had not been in all respects such as the statute had required, it could nevertheless have been enforced as a common law

> bond, because it was executed for a good consideration, and the object for which it was given had been accomplished. But here the difficulty is that there was no lawful attachment, and therefore no lawful authority for taking any bond whatever. The bond is consequently neither good under the statute nor at common law, because there is no sufficient foundation to support it."

Let us apply that decision to the present case. Under the Washington law, one in possession of realty cannot be dispossessed save by means of a valid writ, issued and executed in a pending action in a court having jurisdiction of the matter. Any other mode of eviction is necessarily unlawful. Now, if the Land Company, without going through the form of beginning an action and procuring a writ of restitution, had given a bond to induce the sheriff to evict Huston and put the Land Company in possession, and the sheriff, without color of authority, had done so, it is evident there could be no recovery on the bond. Like the attachment in the cited case, there was no authority in law for the dispossession, and there could be none for taking the bond. So it would need be said, as in the cited case, that "The bond is consequently neither good under the statute or at common law, because there is no sufficient foundation to support it." The actual case is as strong as the hypothetical. Under the decisions of the Supreme Court in the 98 and 100 Washington, the beginning of the action and the issuance of the writ of restitution advant-

aged the Land Company nothing. The proceeding being special, before a court of special and limited jurisdiction, no step could be taken unless jurisdiction was preserved. Here the jurisdiction failed, and Huston's dispossession was effected by void process. The situation, said the Supreme Court, was as though the Land Company "had, without beginning suit at all, gone upon the land in controversy and forcibly removed (Huston) therefrom." We submit that the Pacific National Bank Case is controlling.

Other cases of like effect are *Florrance v. Goodin,* 5 B. Mon., 111, *American Exchange Bank v. Cook* (Kan.), 51 Pac., 65, and *Planters' Bank v. Berry* (Ga.), 18 S. E., 137.

We submit that, from whatever viewpoint considered, there can be no recovery on the bond in suit. It was given for a lawful purpose: to procure the proper exercise of jurisdiction by a court: to effect a lawful dispossession by the use of lawful process. The Sureties did not intend or consent that it should be perverted to an unlawful purpose. It failed to accomplish the purpose for which it was given because the court, whose action it was intended to move, did not have jurisdiction to act. The Sureties are now sought to be held because the sheriff and their principal abused the process of the court and committed an unlawful act. The Sureties did not assent to or know of their illegal conduct, and every rule of law and morals forbids

that they shall be held liable therefor. The Land Company is independently liable for its misconduct. The sheriff and his bondsmen are liable for his illegal act, for his bondsmen undertook that he should properly discharge the duties of his office. The Sureties, however, did not become liable for the good conduct of their principal. They only assumed responsibility for the Land Company's failure to make good its case before a court of competent jurisdiction. They assumed no liability for its independent wrong; for its abandonment of the action in which the bond was given, and its taking of the law into its own hands, and, with the aid of the sheriff, dispossessing Huston without color of right. For any injury which Huston may have suffered from that unlawful act, he must look for recompense to the Land Company and the sheriff. The Sureties are neither legally nor morally responsible therefor.

III. Authorities Cited in Huston's Brief.

The authorities cited by Huston require no discussion or distinction. In the greater number of them, the validity of the bonds sued on was challenged because of mere irregularities in the bonds or in the proceedings in which they were given. They were, unquestionably, rightly decided, for, as the Supreme Court said in the Pacific National Bank Case (124 U. S., 728), "The sureties on a bond of this kind are estopped from setting up, as a defence to an action for a breach of its condi-

tion, any irregularities in the form of proceeding." Some of the authorities go further, however, and hold that under appropriate conditions, the sureties may be estopped to set up want of jurisdiction in the court in which the bond was given. These need brief remark, and we select for that purpose *Hine v. Morse,* 218 U. S., 493 (cited in Huston's brief as *U. S. v. Morse,* 218 U. S., 511), for it goes as far toward sustaining Huston's position as any of the authorities cited.

It appears in the Hine Case that suit was brought in the Supreme Court of the District of Columbia, seeking an order of sale of a minor's realty for the purpose of reinvestment. The suit was heard, and an order was entered directing the sale, appointing a trustee to make it, and fixing the bond that he should give. The bond in suit was given in compliance with the order. It was entitled in and referred to the suit in which the order was made, recited the appointment of the trustee to make the sale, and undertook that he should faithfully discharge his duties as such trustee, and obey such orders as the court might make. It was assigned as breach of the bond, that the principal named therein had assumed the duty and function of trustee for sale of the property, had made the sale as directed and received the proceeds, but had disobeyed an order requiring him to pay such proceeds into court, and had misappropriated the same. The defense was that the Supreme Court of the District did not

have power to order the sale of an infant's property for the purpose of reinvestment. This the Supreme Court doubted, but held that in any event the sureties were estopped to deny the validity of the sale: estopped by the recitals of the bond, and estopped by the fact that, through their execution of the bond, the trustee was enabled to make the sale and receive its proceeds.

We do not question the soundness of the decision, but are unable to discover its applicability to the present case. Here the complaint was filed, the bond executed and delivered, and the writ of restitution issued, on the same day: March 4th. The bond contained no recitals to estop the sureties. It recited that an action had been begun, and there had; it was begun by the filing of the complaint. It recited that a writ of restitution had been issued, and there had. It was lawfully issued, because the statute provides that upon giving a bond the writ may issue when the action is begun. In those acts, recited in the bond, there was nothing wrongful, nothing of which Huston could complain. The wrongful act, whereon Huston's right of action rests, if any he have, was committed on March 10th, when the Land Company, without taking the steps necessary to give the court jurisdiction to act, induced the sheriff to dispossess Huston. But that was an independent wrong, as much outside the scope of the action as though no action had been begun, for so said the Supreme Court in holding that the

situation was the same as though the Land Company, without beginning any action, had forcibly evicted Huston. By executing the bond in suit, the Sureties did not become liable for the Land Company's independent wrongs, committed *coram non judice*. Had the court been invested with jurisdiction, and the writ been lawfully executed, the Sureties would have been liable for any damage suffered by Huston if the Land Company had failed to prove its right to possession, for the condition of the bond is that the Sureties will pay any damages sustained "by reason of the issuance of such writ should the same be wrongfully sued out." Record, p. 3. But here the writ, it seems, was rightfully sued out, for the superior court, hearing the action on its merits, held that the Land Company was entitled to possession of the land. The condition to respond for damages caused by the wrongful suing out of the writ, cannot be extended to cover liability for subsequent wrongful acts which are independent of it.

The situation here is the converse of what it was in the Hine Case. There the order which was alleged to be beyond the jurisdiction of the court had been made, and the bond in suit was given for the purpose of carrying it into effect. Presumptively, the sureties knew the law then as well as they did thereafter, and if they did not wish to participate in a void proceeding, should have refused to execute the bond which was necessary to

carry it into effect. They knowingly made themselves parties to the proceeding, they intentionally aided in carrying it out. They were rightly held estopped to question its validity after others had suffered injury by their acts. Here nothing unlawful had been done when the Sureties executed and delivered the bond. All they did was in aid of the unquestioned jurisdiction of the court. They neither consented to nor knew of the subsequent illegal act by which Huston was dispossessed, and of course cannot be considered to have participated therein. It is idle to talk of their being estopped to question the validity of that act, and manifestly they cannot be held unless it is said that by executing the bond they became liable for any independent wrong committed by their principal, albeit the act was entirely beyond the scope of the action.

Let us make this suggestion. If the wrong which was done under color of the writ reverts back and renders the writ wrongful in its inception, then the judge who ordered it to issue, and the clerk of the court who issued it, are as much liable to Huston as are the Sureties. The Sureties' acts in furtherance of the issuance of the writ were as innocent as those of the judge and clerk; no more injury was done Huston by the Sureties' acts than by the acts of the judge and clerk. The only wrong done Huston was in the unlawful use of the writ after it got into the hands of the Land Company and the sheriff, and for that wrong the Sureties were no

more responsible than were the judge and clerk.

Again: An individual who sets a lawful writ in motion is not liable for its unlawful use, provided he has not participated in or ratified its abuse. *Vide* authorities cited under preceding head. On what theory can the Sureties be held for the illegal acts of the Land Company and the sheriff? Their responsibility for their principal extended no further than to his proceedings in the action, and there is no rule of law or principle of estoppel to hold them for his wrongs independent of the action; for his acts done without the jurisdiction of the court.

The circumstances surrounding the execution and delivery of the bond in suit do not permit invocation of the doctrine of estoppel against the Sureties. That being so the authorities cited in Huston's brief are inapplicable, and the Sureties cannot be held liable for the independent wrongs of their principal.

Respectfully submitted,

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